STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MEDICAL CAPITAL CORPORATION	:	ORDER DTA NO. 824837
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Years 2004 through 2006.	:	

Petitioner, Medical Capital Corporation, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 2004 through 2006.

The Division of Taxation, appearing by Mark F. Volk, Esq. (Clifford Peterson, Esq., of counsel), brought a motion on June 11, 2012, seeking an order dismissing the petition in the above-referenced matter pursuant to 20 NYCRR 3000.9. Petitioner, appearing by Howard Castner, did not respond to the motion. Therefore, the 90-day period for issuance of this order commenced on July 11, 2012.

After due consideration of the motion and all pleadings and proceedings had herein, Daniel J. Ranalli, Supervising Administrative Law Judge, renders the following order.

ISSUE

Whether the petition in this matter should be dismissed for failing to state a cause for relief.

FINDINGS OF FACT

1. Petitioner, Medical Capital Corporation, filed a timely petition with the Division of Tax Appeal on January 18, 2012 in protest of a Conciliation Order, CMS No. 235630, issued to petitioner on November 18, 2011.

2. The protested Conciliation Order recomputed a Notice of Deficiency, Assessment No. L-032522246, to be tax of $47,861.00, plus interest.

3. The instant petition, Form TA-10, states that the amount of tax determined is "$47,861.00 " and the amount contested is "0."

4. On the portion of the petition form designated for petitioner to assert facts and allege errors made by the Division of Taxation (Division) in connection with the protested notice, petitioner asserted, in pertinent part, the following:

> We are requesting that the New York State Department of Taxation and Finance postpone the final determination on this matter.
>
> By way of background, on August 17, 2009 . . . the United States District Court for the Central District of California appointed Thomas A. Seaman . . . as the permanent receiver for [petitioner, two other entities] and their subsidiaries and affiliates (the "Receivership Entities"), pursuant to a Preliminary Injunction and Order: (1) Freezing assets; (2) Appointing a permanent receiver; (3) Prohibiting the destruction of documents; (4) Granting expedited discovery; and (5) Requiring accountings.

Petitioner proceeded by describing the receiver's activities since his appointment to include conducting an extensive forensic accounting, which disclosed overstated income of the Receivership Entities totaling nearly $10 billion for which the receiver filed amended state and federal returns. Petitioner further explained that the amended federal returns requested a refund of approximately $14 million based on the overstated income, which petitioner alleges "was part of the fraud perpetrated by the Receivership Entities . . . ." However, according to petitioner,

"the IRS is still conducting an audit of the Receivership Entities. When the audit is complete, it is possible that state returns will have to again be amended. We expect the IRS audit to conclude by the end of the first quarter of 2012." Petitioner also noted that "[d]ue to the size of the refund in question, the findings of the IRS will need approval of [an unnamed] ***United States Senate subcommittee*** . . . We expect the entire process to be completed by the third quarter of 2012." Based on these assertions, petitioner requested that "any determination on this matter by the New York State Department of Taxation and Finance be postponed until we have a final determination issued by the IRS. At that time, it would be timely to make a final determination on the New York liability."

5. The Division brought the subject motion on June 11, 2012, pursuant to 20 NYCRR 3000.9, on grounds that the Division of Tax Appeals is without jurisdiction to consider the merits of the petition insofar as the petition fails to state a cause for relief and the Division of Tax Appeals does not have jurisdiction of the subject matter of the petition or over petitioner. The Division asserts, in part, that in light of petitioner indicating on its petition that there is no amount in controversy (***see*** Finding of Fact 3), petitioner

> fails to contest the reasonableness of the basis for the Conferee's determination of its final tax liability of $47,861.00 or argue that the computation of the $47,861.00 was incorrect. Put differently, there is no controversy over Medical Capital Corporation's final tax liability of $47,861.00. Therefore, Medical Capital Corporation has failed to state a cause of action (affirmation of Clifford Peterson, Esq., ¶ 5 [internal citations omitted]).

The Division further avers that:

> The possibility of a future dispute over a possible refund claim filed by Medical Capital Corporation to report changes to its New York taxable income that may result from its reporting amendments to its federal taxable income for the period at issue does not give the Division of Tax Appeals jurisdiction over such a dispute.

> [Tax Law § 2000]; 20 NYCRR § 3000.9(ii) [*sic*]. And, thus, the Division of Tax Appeals also lacks jurisdiction over Medical Capital Corporation. 20 NYCRR § 3000.9(vii) [*sic*] (***id.*** at ¶ 9).

CONCLUSIONS OF LAW

A. A motion may be brought to dismiss a petition on grounds that, inter alia, the pleading fails to state a cause for relief or that the Division of Tax Appeals lacks jurisdiction over either the subject matter of the petition or the taxpayer (***see*** 20 NYCRR 3000.9[a][1][ii], [vi], [vii]; ***see also*** Tax Law § 2006[5]).

B. Motions filed pursuant to 20 NYCRR 3000.9 are, unless otherwise in conflict with the Rules of Practice and Procedure of the Tax Appeals Tribunal, "subject to the same provisions as motions filed pursuant to section 3211 of the CPLR . . . " (20 NYCRR 3000.9[c]). Regarding the first ground upon which the Division basis its motion in this matter, i.e., that the petition fails to state a cause for relief pursuant to 20 NYCRR 3000.9(a)(1)(vi), the comparable provision of the CPLR authorizes a party to move to dismiss a cause of action on the ground that "the pleading fails to state a cause of action . . . " (CPLR 3211[a][7]).

C. In ***High Tides, LLC v. DeMichele*** (88 AD3d 954, 956-57 [2011]), the Appellate Division explained the standard for granting a motion to dismiss under CPLR 3211(a)(7):

> the pleading is to be afforded a liberal construction (***see*** CPLR 3026; ***EBC I, Inc. v. Goldman, Sachs & Co.***, 5 NY3d 11, 19 [2005]; ***Leon v. Martinez***, 84 NY2d 83, 87-88 [1994]), and the court must accord the plaintiff 'the benefit of every possible favorable inference,' accept the facts alleged in the complaint as true, and 'determine only whether the facts as alleged fit within any cognizable legal theory' (***Leon v. Martinez***, 84 NY2d at 87-88). Such a motion should be granted only where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action (***see Kuzmin v. Nevsky***, 74 AD3d 896, 898 [2010]; ***Hartman v. Morganstern***, 28 AD3d 423, 424 [2006].

D. The Division of Tax Appeals "is a forum of limited jurisdiction" (***Matter of Bray***

Terminals, Tax Appeals Tribunal, February 13, 1997, ***confirmed*** 248 AD2d 832 [1998], ***lv denied*** 92 NY2d 806 [1998]; ***see*** Tax Law §§ 2000, 2008[1]). "Therefore, absent legislative action to provide such jurisdiction as the petitioner believes that we possess, we cannot extend our authority to areas not specifically delegated to us" (***Matter of Hogan***, Tax Appeals Tribunal, November 25, 2009).

E. Proceedings before the Division of Tax Appeals are "commenced by the filing of a petition . . . *protesting* any written notice of the division of taxation which has advised the petitioner of a tax deficiency, determination of tax due, a denial of a refund . . . or any other notice which gives a person the right to a hearing . . . " (Tax Law § 2008[1] [emphasis added]). Hence, the Tax Law requires that petitions be filed in *protest* of a statutory notice.

F. The Rules of Practice require that petitions filed in the Division of Tax Appeals state

> in clear and concise terms, each and every error which the petitioner alleges has been made by the division, bureau or unit (e.g., in issuing a notice of deficiency or in denying a refund application), together with a statement of the facts upon which the petitioner relies to establish each said error . . . (20 NYCRR 3000.3[b][5]).

The Rules of Practice also require that petitions state "the amount of tax in controversy" (20 NYCRR 3000.3[b][4]) and "the relief sought by the petitioner" (20 NYCRR 3000.3[b][6]). Thus, in this matter, it was incumbent on petitioner "to plead sufficient facts to call into question the [Division's] deficiency determination" (***Prairie v. Commr.***, 49 TCM 1098 [1985], ***citing Scherping v. Commr.***, 747 F2d 478, 480 [8th Cir 1984]). These requirements, that petitioner allege errors made by the Division and set forth the relief sought, are not insignificant as the purpose of the pleading "is to give the parties and the division of tax appeals fair notice of the matters in controversy and the basis for the parties' respective positions" (20 NYCRR

3000.4[a]). Furthermore, the burden of proof in this matter rests with petitioner (***see*** Tax Law § 1089[e]).

G. When a "pleading is attacked for alleged inadequacy in its statements, our inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law'" (***Foley v. D'Agostino***, 21 AD2d 60, 65 [1964], ***quoting Dulberg v. Mock***, 1 NY2d 54, 56 [1956]). Yet the instant petition fails to allege even one error made by the Division in issuing the assessment or Conciliation Order. Contrarily, the petition requests "that any determination on this matter . . . be postponed . . . ." However, the Division of Tax Appeals is without jurisdiction to grant or deny the relief requested, namely to postpone an assessment made by the Division (***cf. Matter of All Corps***, Tax Appeals Tribunal, January 16, 1992 [order dismissing petition for failure to state a cause for relief was affirmed where petitioner failed to raise "any legal or accounting question"]). Accordingly, a petition, as here, filed solely to request that an assessment issued by the Division be postponed is insufficient to confer jurisdiction upon the Division of Tax Appeals.

H. A motion to dismiss a petition "for failing to state a cause for relief is intended to eliminate the need for unnecessary hearings, by eliminating petitions that do not assert an error" (***Matter of Scotto***, Tax Appeals Tribunal, January 16, 1992). Insofar as petitioner has failed to assert even one error made by the Division in connection with its issuance of Assessment No. L-032522246 or the Conciliation Order, CMS No. 235630, coupled with petitioner's failure to respond to the Division's motion with an argument to the contrary, petitioner's pleadings herein fail to state a cause for relief. Moreover, on the basis of the foregoing, the Division of Tax Appeals has neither jurisdiction of the subject matter of the petition (20 NYCRR

3000.9[a][1][ii]) nor jurisdiction over petitioner (20 NYCRR 3000.9[a][1][vii]) given petitioner's failure to state a cause for relief. Consequently, the petition in this matter is insufficient to confer jurisdiction upon the Division of Tax Appeals.

I. The Division of Taxation's motion to dismiss is hereby granted and the petition of Medical Capital Corporation is dismissed.

DATED: Albany, New York
August 30, 2012

/s/ Daniel J. Ranalli
SUPERVISING ADMINISTRATIVE LAW JUDGE